UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DOLCHIN PRATT, LLC d/b/a JIMMY JOHN'S GOURMET SANDWICHES,
DOLCHIN MCHENRY ROW, LLC d/b/a JIMMY JOHN'S GOURMET SANDWICHES, AND
JIMMY JOHN'S FRANCHISE, LLC

and

BALTIMORE GMB OF THE INDUSTRIAL WORKERS OF THE WORLD

Cases 05-CA-135334
05-CA-135364
05-CA-135371
05-CA-135373
05-CA-135383
05-CA-135416
05-CA-136927

ORDER[1]

The petitions to revoke subpoenas duces tecum B-1-KK1FZF, B-1-KK1Q5J, and B-1-L4D1FH filed by Dolchin Pratt, LLC d/b/a Jimmy John's Gourmet Sandwiches, Dolchin McHenry Row, LLC d/b/a Jimmy John's Gourmet Sandwiches, and Jimmy John's Franchise, LLC (the Petitioners) are denied. The subpoenas seek information relevant to the matters under investigation and describe with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations.[2] Further, the Petitioners have failed to establish any

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] Our dissenting colleague would grant the petitions to revoke the subpoenas on two grounds. First, he contends that the subpoenas "do not pertain to the substantive allegations of the charges." Second, advancing an argument not raised by the Petitioners, he contends that the Regional Director failed to establish an objective factual basis supporting the inquiry into the relationship among the Petitioners beyond the mere allegation in the second amended charges that the Petitioners are a joint and/or single employer. We disagree.

other legal basis for revoking the subpoenas. See generally *NLRB v. North Bay*

Contrary to our colleague, the subpoenas lie well within the scope of the Board's broad investigative authority, which extends not only to the substantive allegations of a charge, but to "*any* matter under investigation or in question" in the proceeding. 29 U.S.C. § 161(1) (emphasis added); Sec. 102.31(b) of the Board's Rules. Moreover, nothing in Sec. 11 of the Act or Sec. 102.31(b) of the Board's Rules can be read to impose a requirement that the Regional Director articulate "an objective factual basis" in order to compel the production of information that is necessary to investigate a pending unfair labor practice charge. Nor can such a requirement be justified on the basis of Sec. 10054.4 of the Board's Casehandling Manual.

First, Sec. 10054.4 of the Manual does not relate to or even mention subpoenas, and it has never been interpreted by the Board in the manner urged by our colleague. Second, the Manual itself states that it is merely "intended to provide procedural and operational guidance for the Agency's Regional Directors and their staffs," and "is not a form of binding authority" on the General Counsel or the Board. Third, Sec. 3(d) of the Act vests the General Counsel with final authority "in respect of the investigation of charges and issuance of complaints." 29 U.S.C. § 153(d); see also *Beverly California Corp.,* 326 NLRB 232, 236 (1998), enfd. in part and remanded 227 F.3d 817 (7th Cir. 2000). The General Counsel therefore controls the theory of the case and the scope of the investigation upon the receipt of a charge alleging an unfair labor practice. See *NLRB v. Fant Milling Co*., 360 U.S. 301, 308 (1959) ("Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it.") (internal citation omitted); *BCI Coca-Cola Bottling Company of Los Angeles*, 361 NLRB No. 75, slip op. at 5 n.11 (2014) ("[d]eciding what steps to take before issuing a complaint, including how to investigate the charge" is within the General Counsel's unreviewable prosecutorial discretion). That authority necessarily includes determining whether the preliminary evidence gathered from the parties warrants further investigation and processing of an unfair labor practice charge, with the ultimate question of whether a complaint should issue.

Finally, the Supreme Court has decisively rejected the contention that a demonstration of probable cause or other threshold factual showing is a prerequisite to the exercise of the subpoena power of an administrative agency in the course of a legitimate investigation to determine whether and against whom proceedings should be initiated. See, e.g., *United States v. Powell,* 379 U.S. 48, 57 (1964); *United States v. Morton Salt Co.,* 338 U.S. 632, 640–643 (1950); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 214-216 (1946). In cases too numerous to list, the Federal district courts and courts of appeals have applied the principles articulated in *Powell, Morton Salt, and Oklahoma Press* in enforcing Board subpoenas. See, e.g., *NLRB v. Marano*, 996 F.Supp.2d 720, 723 (E.D.Wis. 2014) ("[T]here is no "probable cause" requirement in the agency subpoena context."); *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998); *NLRB v. Interstate Dress Carriers,* 610 F.2d 99, 111 (3d Cir. 1979); *NLRB v. C.C.C. Assoc., Inc*., 306 F.2d 534, 538 (2d Cir.1962); *NLRB v. Kingston Trap Rock Co.,* 222 F.2d 299, 301 (3d Cir. 1955).

Plumbing, Inc., 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507(4th Cir. 1996).[3]

Dated, Washington, D.C., November 6, 2015.

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

Member Miscimarra, dissenting:

I believe that Section 11(1) of the Act – indicating that a subpoena must relate to the matters under investigation – requires more in this case than merely stating the name of a possible single or joint employer on the face of the charge. Cf. Casehandling Manual Sec. 10054.4 (stating that "additional and more complete evidence, including all relevant documents," should be obtained if "consideration of the charging party's evidence and the preliminary information from the charged party *suggests a prima facie case*") (emphasis added). Contrary to my colleagues' suggestion, I am not arguing for a "probable cause" requirement. I am merely indicating that the Board should comply with its own stated procedures, which are consistent with the Act and its legislative history indicating that Congress intentionally *divested* the Board of the ability to undertake investigations, at its own initiative, whenever there was "reason to believe, from information acquired from any source whatsoever, that any person has engaged in or is engaging in any such unfair labor practice."[4] Accordingly, I would grant the petitions to

[3] The Petitioners contend that certain information sought by the subpoenas duces tecum is confidential and proprietary. While the Petitioners have failed to establish grounds for revoking the subpoenas, we encourage them to seek a confidentiality agreement with the Regional Director.

[4] The earliest Wagner Act legislation, as introduced, would have given the Board broad affirmative powers to address matters at the Board's own initiative. These bills stated: "Whenever any member of the Board, or the executive secretary, or any person

revoke because the General Counsel has failed to articulate an objective factual basis for investigating possible single or joint employer relationships between Jimmy John's Franchise, LLC, and the other Petitioners. Moreover, the subpoenas do not pertain to the substantive allegations of the charges. Therefore, I would find that the General Counsel has not established that the subpoenas satisfy the requirements of Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations, and I would grant the petitions without prejudice to the ability of the General Counsel to issue new subpoenas seeking this information, if he can establish an objective factual basis

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designated for such purpose by the Board, *shall have reason to believe, from information acquired from any source whatsoever, that any person has engaged in or is engaging in any such unfair labor practice, he shall in his discretion issue and cause to be served upon such person a complaint*. . . . Any such complaint *may be amended by any member of the Board or by any person designated for that purpose by the Board at any time prior to the issuance of an order based thereon; and the original complaint shall not be regarded as limiting the scope of the inquiry*." S. 2926, 73d Cong. § 205(b) (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act of 1935 (hereinafter "NLRA Hist.") at 6 (emphasis added); H.R. 8434, 73d Cong. § 205(b) (1934), 1 NLRA Hist. at 1133 (emphasis added). By the time the NLRA was enacted, Congress had eliminated the Board's power to initiate or expand unfair labor practice proceedings, at the Board's own initiative, as reflected in the express limitations set forth in Sections 10(b) and 11(1). Therefore, Congress intended that the Board would *not* have the powers of a "roving commission." *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 164 (4th Cir. 2013) (citing H.R. Rep. No. 74-969 (1935), reprinted in 2 NLRA Hist. at 2932).

I agree the Board has broad investigative authority regarding pending charges. However, the Act and its legislative history render inapposite the cases relied upon by my colleagues, which suggest the authority vested in certain other agencies is "more analogous to [a] Grand Jury, which . . . can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co*., 338 U.S. 632, 642-43 (1950). Congress expressly precluded the Board from conducting investigations at its own initiative based "merely on suspicion that the law is being violated." Id. In any event, the Board should comply with its own stated procedures, and they provide for Regions to obtain "additional and more complete evidence" only when "the charging party's evidence and [other] preliminary information . . . suggests a prima facie case." Casehandling Manual Sec. 10054.4.

supporting such an inquiry, beyond the mere allegation in the second amended charges that Jimmy John's is a joint and/or single employer with the other Petitioners.

Dated, Washington, D.C., November 6, 2015.

PHILIP A. MISCIMARRA, MEMBER